No. 11,956

# In the United States Court of Appeals for the Ninth Circuit

SOUTHERN CALIFORNIA FISHERMAN'S ASSOCIATION, W. S. OHIRA, KOTO YAMAMOTO, M. IWASAKI, ROKU SEIKO, BEN (BENKICHI) MAEDA, SEN TANAKA, MIJOJI KAWASAKI, NAGA NOMURA, YOSABURO HAMA, T. KOISO, T. NONOSHITA, JIM TEIZO HATASHITA AND K. NAKAMURA, APPELLANTS

*v.*

UNITED STATES OF AMERICA, APPELLEE

*UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA*

## BRIEF FOR THE UNITED STATES, APPELLEE


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# INDEX



## CITATIONS

# In the United States Court of Appeals for the Ninth Circuit

No. 11956

SOUTHERN CALIFORNIA FISHERMAN'S ASSOCIATION, W. S. OHIRA, KOTO YAMAMOTO, M. IWASAKI, ROKU SEIKO, BEN (BENKICHI) MAEDA, SEN TANAKA, MIJOJI KAWASAKI, NAGA NOMURA, YOSABURO HAMA, T. KOISO, T. NONOSHITA, JIM TEIZO HATASHITA AND K. NAKAMURA, APPELLANTS

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### OPINION BELOW

The district court did not write an opinion. Its findings of fact and conclusions of law appear at R. 20-26.

### JURISDICTION

This is an appeal from a judgment entered on April 13, 1948, in a condemnation proceeding instituted by the United States (R. 27-30). On May 24, 1948, the defendants filed notice of appeal (R. 31).

The jurisdiction of the district court was invoked under the Act of August 1, 1888, 25 Stat. 357, as amended, 40 U. S. C. sec. 257; Title II of the Act of December 17, 1941, 55 stat. 810, 815, and the Act of December 26, 1941, 55 Stat. 862 (R. 4-5). The jurisdiction of this Court rests upon 28 U. S. C. sec. 1291.

## QUESTION PRESENTED

Where improvements have been placed upon lands by a party who has only a revocable permit from the fee owner, which permit provides that it may be cancelled by the fee owner by serving a thirty-day notice and that the improvements are owned by the permittee who may remove them during the thirty days following such notice of revocation, and the United States condemns the property after service of such notice by the fee owner but before expiration of the thirty days, must the United States, in making just compensation for the improvements taken, pay to the owner thereof more than the value of the improvements as removed from the land?

## STATEMENT

The facts in this case are not in dispute. On February 21, 1942, the United States instituted this proceeding to condemn certain lands on Terminal Island in Los Angeles Harbor for the use of the Navy Department (R. 3, 8, Fdg. IV, R. 22).[1] The lands so condemned were owned in fee by the City of Los Angeles (Fdg. I, R. 21).[2] For varying periods of time prior to institution of this proceeding the appellants occupied fifteen of the parcels condemned under revocable permits issued by the Board of Harbor Commissioners of the City of Los Angeles. These permits allowed the defendants to occupy and improve the property. They further provided that the city could cancel the permits by giving the occupants thirty days' notice to move, and that any improvements constructed by the permittees remained their property and could be removed by them within the thirty-day period following such notice. (Fdg. II, R. 21-22.)

Appellants had constructed buildings and structures upon the premises occupied under such permits (Fdg. III, R. 22). The city of Los Angeles, at the request of the Navy Department, served notices of revocation on appellants prior to institution of this proceeding on February 21, 1942. How-

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[1] The original complaint does not appear in the printed record.

[2] The interest of the city of Los Angeles had already been settled prior to trial of the issue of value of appellants' improvements, and the city has no interest in this appeal (Stip., R. 16).

ever, the district court on February 25, 1942 (Judge Hollzer, presiding) granted the Government an order of immediate possession effective after February 27, 1942, pursuant to which the Government took possession of the land and structures.[3] This occurred prior to expiration of any of the notices of revocation, and as a result appellants were unable to remove their structures. (Stip., R. 15, Fdgs. IV, V, R. 22-23.)

The Government having taken the structures of appellants, it filed an amended complaint on March 16, 1942, covering those interests and asking a determination of just compensation therefor (R. 2-13).

On August 12, 1947, issue having been joined, the cause came on for trial before Judge Weinberger. While the issue was just compensation for the improvements, the only difference between appellants and the United States, below and here, is as to the basis of valuation. Appellants contend that the improvements should be valued as part of the land, without regard to the fact that when the Government condemned they were under a requirement to remove the improvements, and the Government contends that the true measure of value is the value of the improvements as removed. The parties are agreed as to the respective values for each set of improvements on either theory (Appellants' Br., p. 4; Joint Exhibit 1, R. 35). These values for each parcel are set out in Fdg. VI, R. 23.

At the trial the court below ruled that the value of the improvements as removed from the land was the proper basis of valuation (R. 84).[4] Following trial the court entered its findings and conclusions. The court concluded that appellants were entitled to the value of the improvements as removed from the land (Concl. V, R. 25) and entered judgment accordingly (R. 27). Appellants thereafter took this appeal.

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[3] The Government removed the structures after it took possession (Stip., R. 16). Presumably the exigencies of national defense did not permit the acquisition of *possession of the land* to be delayed until the thirty-day notices expired.

[4] This was in accord with an earlier pretrial ruling by Judge Weinberger on the point, and prior to that Judge Hollzer had made the same ruling (R. 18-19).

## ARGUMENT

**The District Court Correctly Ruled That Value of Buildings as Removed from the Land Constitutes Just Compensation to Appellants for the Taking of Buildings Which They Were Under the Necessity of Removing from the Land Condemned**

The only question presented on this appeal is whether, as appellants contend, the fact that they could be compelled to remove the buildings from the land, and were actually under a requirement to do so at the time the Government took the buildings, must be ignored in determining compensation for the taking. That question is answered by resort to elementals of condemnation law.

When the United States takes private property for a public use, the Fifth Amendment requires that the Government pay just compensation. It is the "owner's loss" which must be compensated for. *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266, 281 (1943). The Constitution "merely requires that an owner of property taken should be paid for what is taken from him. * * * And the question is what has the owner lost, not what has the taker gained." *Boston Chamber of Commerce* v. *Boston,* 217 U. S. 189, 195 (1910). And as compensation for appellants' loss they are entitled to receive market value fairly determined. *United States* v. *Miller,* 317 U. S. 369, 374 (1943).

Applying these principles to the instant case, what was taken from appellants consisted of buildings placed upon lands of the city of Los Angeles under revocable permits. Appellants never had more than ownership of buildings which they could be required at any time to remove within thirty days. And in this case the removal notices had already been served when the taking occurred.[5] It is absurd to argue that the market value of buildings is the same

[5] At Br. 9 appellants suggest that the Government's liability should be affected by the consideration that "it was the act of the condemnor itself which caused the cessation of the landlord-tenant relationship." The proposition that the necessity of taking property upon which a landlord-tenant relationship exists, and the consequent termination of that relationship, should operate to penalize the Government and require it to compensate owners for anything more than they have lost is of course untenable.

regardless of whether the owner of the buildings has a legal right to maintain them on another's land for thirty days, for six months, or for six years, or, as in the case where the owner of the land also owns the buildings, permanently. Yet that was appellants' position below (R. 95) as it is here.

Appellants are simply asking compensation for a greater loss than they suffered. They contend that when the Government condemns property the nature and limitations of an owner's title must be ignored in determining what compensates him for his loss. The proposition answers itself, but it was long ago answered by the Supreme Court. *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189 (1910). More recently, the decision in *United States* v. *Petty Motor Co.*, 327 U. S. 372 (1946) is conclusive that a person's compensation is limited by the nature of the legal interest he has in the property. In that case the Government condemned property occupied by tenants who were legally entitled to remain in possession for only a short time. The trial court, however, had allowed compensation based upon the length of time which, absent the Government's taking, they might have been permitted to remain in possession.[6] This was affirmed by the circuit court of appeals. *United States* v. *Petty Motor Co.*, 147 F. 2d 912 (C.C.A. 10, 1945). But the Supreme Court reversed, holding that the compensation for such tenants should be based upon only such time as they had a legal right to remain on the property, and quoted from *Emery* v. *Boston Terminal Co.*, 178 Mass. 172, 185, 59 N. E. 763, 765 (1901), as follows:

> * * * The evidence merely showed that the landlords and tenants were mutually satisfied and were likely to keep on together. It added nothing except by way of corroboration to the testimony that they both intended to keep on. Changeable intentions are not an interest in land, and although no doubt such intentions may have added practically to the value of the petitioners' holding, they could not be taken into account

[6] It may be noted that appellants also seek to inject into this case (Br. 9) the circumstance that they had occupied the lands for long periods "and presumably would have continued indefinitely had not this condemnation taken place."

> in determining what the respondent should pay. They added nothing to the tenants' legal rights, and legal rights are all that must be paid for. * * *

So here appellants had no legal right to remain on the property. Hence the case cannot be treated as if they did have such a right. Appellants were entitled to compensation for the buildings based upon consideration of the necessity of their removal. To ignore the fact that appellants were under the necessity of removing the buildings would result in permitting recovery as if they had a permanent right in the land. Obviously in the instant case appellants could not, as against the fee owner, share in an award made for the entire property on the assumption that they had a right to remain in possession. For example, a tenant whose lease provides that upon condemnation it may be terminated at the option of the lessor, is not entitled to share the award. *United States* v. *21,815 Square Feet of Land,* 155 F. 2d 898 (C.C.A. 2, 1946); *Goodyear Shoe Machinery Co.* v. *Boston Terminal Co.,* 176 Mass. 115, 57 N. E. 214 (1900); *United States* v. *96,900 Square Feet more or less,* 65 F. Supp. 833 (S.D. N.Y., 1946). In the instant case the Government has settled with the fee owner (R. 16), but that circumstance does not increase appellants' rights. As the court said in *United States* v. *Petty Motor Co.,* 327 U. S. 372, 376 (1946), with reference to a similar situation, "There would be no greater right where the landlord has been otherwise satisfied." In this case, if the Government had delayed the filing of the condemnation proceeding until the thirty-day period for removal already in effect had run out, appellants could not have realized more than the removal value of the buildings. That is all that was taken from them by the condemnation. There is no basis for holding that, because governmental necessity moved the United States to proceed before the notices had expired, the Government should pay them more.

Appellants' contention is thus shown to be without any support in reason or justice. Moreover, the question here presented is not one of first impression. It was squarely presented and passed upon in *Messer* v. *United States,*

157 F. 2d 793 (C.C.A. 5, 1946). There the Government condemned an interest in real property owned by the city of Birmingham, Alabama. Appellant Messer owned a house situated on the property, but she was merely a licensee of the city under a license subject to revocation. There, as here, upon revocation of the license she was entitled to remove her property from the land. There, as here, after institution of the condemnation proceeding, the Government settled with the city for its interest. There, as here, the issue tried was just compensation for the taking of the house. And there, as here, the question the house-owner placed before the court was, as stated by the circuit court of appeals (157 F. 2d, p. 794):

> Was it correct for the jury to consider, in its determination of just compensation for the house and other improvements, that the owner was under a duty to the owner of the land to remove them within a reasonable time after notice was given?

And, as appellants concede (Br. 12), the decision in the *Messer* case rejected the contention they make here. Appellants practically concede that the *Messer* decision was correct, but they seek to distinguish it (Br. 11-12) on the ground that in the instant case the Government condemned all interests in the property while in the *Messer* case, they say, "only the interest of the licensee and not the interest of the owner of the fee" was condemned. The *Messer* decision can not be thus avoided. In the first place, it is not true that there the Government did not condemn the interests of the fee owner as well as the interest of the licensee. After institution of the proceeding the Government settled the claim of the city "and the court below dismissed the condemnation proceedings." And in order to make an award to the owner of the house whose claim had not been settled, the court "re-instituted the condemnation proceedings." That is the situation here, except that the court below did not inadvertently dismiss the proceeding while the claim of appellants remained to be adjudicated. Secondly, even if they were right about the facts of the *Messer* case, their attempted distinction lacks merit. That is proven by the

obvious fact that, whether the Government had settled with the city of Los Angeles prior to institution of condemnation proceedings and had limited such proceedings to the interests of appellants, or, as it did in this case (and in the *Messer* case), condemned the interests of the city of Los Angeles and the interests of appellants and thereafter settled with the city, the *loss* suffered by appellants is the same and the *compensation* should be the same in either case.

Appellants argue (Br. 7-13) that the unit rule method of valuation should be used, i.e., the value of the land and buildings as a unit as though both were owned by the owner of the fee in the land. But where, as here, the claim of the fee owner has been settled by the Government, the unit rule is meaningless. *United States* v. *Petty Motor Co.*, 327 U. S. 372 (1946); *Messer* v. *United States,* 157 F. 2d 793, 795 (C.C.A. 5, 1946). In such a situation the Supreme Court observed in the *Petty Motor Co.* case (327 U. S. p. 374) that "the value of the use of the totality of the property, which was taken, thus lost all meaning * * *." Counsel for appellee recognized this in the court below. When asked by the court if he were offering to prove the value "of the improvements and the real estate," appellants' counsel stated, "Oh, no, just the improvements. That is all we are considering here." (R. 94.) Appellants never did offer to prove the value of the whole property.

Even if the Government had not settled with the fee owner, the case still would not lend itself to the unit rule method of valuation. At Br. 7-8 appellants cite cases holding that where the Government condemns land upon which improvements stand, and both land and improvements are owned by the same person, the basis of valuation is the market value of both considered as a real property unit. That is unquestionably the law, but the cases cited are inapplicable here since there is not a unity of ownership in the land and the improvements.

From this point appellants progress to the proposition that where there are divided interests in real property the same rule prevails, citing *Bogart* v. *United States,* 169 F. 2d 210 (C.C.A. 10, 1948); *Eagle Lake Improvement Co.* v. *United States,* 160 F. 2d 182 (C.C.A. 5, 1947), and *United*

*States* v. *19,573.59 Acres of Land,* 70 F. Supp. 610 (D. C. Neb., 1947). The soundness of these cases is not questioned, but they do not, as appellants claim, support the application of the unit rule to the case now presented. In each of the cases cited the property condemned was first wholly owned in fee by one person, and the fee owner, prior to the condemnation, conveyed a leasehold in the property condemned to another. The property remained a unit, and the fee owner and the lessee each had interests *in the whole.* The lessee owned no part of the property outright and could remove no part of it upon expiration of the lease. Obviously, in such a situation neither the unity of the property nor its value is affected by the creation of the temporary interest.

Here appellants argue that the land and improvements should be valued as though they were all owned by the fee owner. But the land and improvements have never constituted a unit. As stated by appellants (Br. 3, fn. 1) "the city of Los Angeles could revoke the permits on 30 days written notice and that the Appellants could construct and *would own the improvements.*" (Italics supplied.) There is no unit here. The city owns merely the fee and the right to compel removal of the buildings. Appellants own the buildings under the handicap of being required to remove them. To allow an award based on the value that the lands and improvements could command in the open market if they were owned by one person is to require the Government to pay into court an amount greater than the aggregate value of the interests actually existing in the fee owner and the owner of buildings under these restrictions. To do so is to value something simply not in existence. The lack of support for appellants' position in the cases discussed is indicated by the fact that the same court which decided the *Eagle Lake Improvement Co.* case, relied upon by appellants, later decided the case of *Messer* v. *United States,* 157 F. 2d 793 (C.C.A. 5, 1946), which as shown at p. 6 *supra.* completely rejects appellants' position here.

Moreover, even if the unit rule could be applied to the instant case, it would not result in the value contended for by appellants. Under that rule the buildings are included

to the extent that they enhance the value of the land. It goes without saying that the land here involved could not be enhanced in value by buildings not owned by the fee owner, and under the necessity of being removed by the licensee at the time of the taking, to the same extent as if the buildings were owned by the fee owner.

At Br. 13-19, appellants argue that, notwithstanding the fact that, as between themselves and the city of Los Angeles, the buildings were personal property, they are regarded as realty when the property is condemned. It is true, of course, that when the Government condemns lands upon which are buildings or fixtures owned by a third party having a lease with the right to remove the buildings or fixtures at the expiration thereof, the buildings or fixtures are nevertheless taken by a condemnation of the land and must be compensated for. In other words, the condemnor can not require the owner to remove the buildings or fixtures, or remove them itself and force them upon the owner and thus reduce its liability. So, where a condemnor has contended that a taking of the land was not a taking of buildings or fixtures owned and subject to removal by third parties, the courts have held to the contrary. Such are the cases of *United States* v. *Seagren,* 60 App. D. C. 183, 50 F. 2d 333 (1931); *City of Los Angeles* v. *Hughes,* 202 Cal. 731, 262 Pac. 737 (1927); and *In re Allen Street and First Avenue,* 256 N. Y. 236, 176 N. E. 377 (1931) cited by appellee at Br. 13-16. But that is the only question decided in those cases. They do not involve or deal with the question of the basis of fixing the value which the Government must pay the owner of buildings or fixtures required to be removed. That such decisions are inapposite on the question of valuation of the buildings was readily recognized by the Court of Appeals for the Fifth Circuit when it distinguished the *Seagren* decision in *Messer* v. *United States,* 157 F. 2d 793, 795 (1946).

The only cases cited by appellants (Br. 17-18) which appear to lend the slightest support to their contention are the Missouri cases, *City of St. Louis* v. *Rossi,* 333 Mo. 1092, 64 S. W. 2d 600 (1933), and *City of Ladue* v. *St. Louis Public Service Co.,* 168 S. W. 2d 966 (Mo. App. 1943). The facts recited in the first cited case are so uncertain as to render

iscussion of the case impracticable. In the *City of Ladue* ase the court recognized that the owner of the buildings ere involved had no interest in the land, but only a right remove them (168 S. W. 2d, p. 969). In saying that the wner was entitled to "the market value of her buildings, scertained on the basis of what they were worth for the use which they were employed as they stood upon the land" e court did not say that she was entitled to have them alued as though she also owned the land.[7] Moreover, asuming that to be the meaning of the decision, it is unsound ecause the owner of the buildings had no right other than remove the buildings, and to value their use in conjuncon with the land is to value a use of which they were not sceptible. Compare *United States* v. *Sanitary Dist.*, 149 . 2d 951, 954 (C.C.A. 7, 1945). The only right the owner ad in the buildings was the right to remove them; that as all that she lost by the condemnation, and that right as worth to her only the amount which she could have ealized by exercise of the right.[8]

To allow other than removal value of buildings to an wner whose sole right in them is limited to their removal to require the Government to compensate an owner on a asis other than the owner's loss. Whatever may be the ule in Missouri, it is not controlling here, and if the Misouri decisions stand for the proposition advanced by apellants, they are unsound on reason and authority.

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[7] See *Messer* v. *United States*, 157 F. 2d 793, 795-796 (C.C.A. 5, 946), where the *City of Ladue* case was rejected as an authority or the contention here made by appellants. Moreover, the *City of adue* case was a contest between the fee owners and the owner of e buildings on distribution of an award already determined. Whether the condemnor must pay value of the buildings as though nd and buildings were owned by one person was not a question in e case. It seems to have been assumed that the condemnation ward was on that basis.

[8] The Missouri Court of Appeals cited as authority 2 Lewis, minent Domain, section 726, p. 1269. It is there stated that "They buildings] are to be valued as part of the realty and not merely for e materials they contain or for what they are worth for removal." ut the cases cited in support are all cases where the fee to the land nd the buildings *were owned by the same person.* Thus Lewis was ot dealing with the situation here presented and is not authority for e proposition for which the Missouri Court cited it.

In federal condemnation proceedings what constitutes just compensation under the Fifth Amendment is a federal question. *United States* v. *Miller,* 317 U. S. 369, 379-380 (1943). And as shown (p. 4 *supra*), just compensation in federal condemnation proceedings is the value of the owner's loss, not the taker's gain. Applying these principles here, the soundness of the judgment below is manifest.

## CONCLUSION

For the foregoing reasons it is submitted that the judgment appealed from be affirmed.

Respectfully,

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